STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2009
v	No. 280813 Wayne Circuit Court
DENNIS DANELL WHITSETT, Defendant-Appellant.	LC No. 06-009975-01

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial[1] convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables).[2] Defendant was sentenced, as a second habitual offender, MCL 769.10, to 29 to 60 years in prison for each of three first-degree criminal sexual conduct convictions. We affirm.

[1] Five cases, including the case on appeal, were consolidated in the lower court; the additional lower court case numbers are 06-9974, 06-9976, 06-9977, and 06-9978. In 06-9974, the jury found defendant guilty of two counts of third-degree criminal sexual conduct, MCL 750.520d. Defendant was sentenced to 14 to 22 ½ years in prison for each conviction. In 06-9976, the jury found defendant guilty of five counts of first-degree criminal sexual conduct, MCL 750.520b, one count of felony-firearm, MCL 750.227b, and one count of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to life in prison for each of the five first-degree criminal sexual conduct convictions, five to seven and a half years in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. In 06-9977, the jury found defendant guilty of two counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of kidnapping, MCL 750.349. Defendant was sentenced to life in prison for each of the two first-degree criminal sexual conduct convictions, and 25 to 50 years in prison for the kidnapping conviction. In 06-9978, the jury found defendant guilty of one count of kidnapping, MCL 750.349, and one count of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g. Defendant was sentenced to 14 to 30 years for the kidnapping conviction and five to seven and a half years in prison for the assault with intent to commit second-degree criminal sexual conduct conviction.

[2] Defendant was acquitted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

Defendant's sole argument on appeal is that the trial court abused its discretion by admitting charged prior bad acts alleged to have been perpetrated by defendant. "A trial court's admission of other-acts evidence is reviewed for an abuse of discretion." *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[Preliminary] questions of law are reviewed de novo." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). If there is an error in the admission of bad acts evidence, "defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

MRE 404(b)(1) provides, in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake . . . . [*People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting MRE 404(b)(1)].

In short,

> [e]vidence of other acts may be admitted under MRE 404(b)(1) if: (1) the evidence is offered for a proper purpose, i.e., something other than a character to conduct theory, (2) the evidence is relevant . . . to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by its potential for undue or unfair prejudice under MRE 403. [*Dobek*, *supra* at 85 (internal quotation and citation omitted).]

Defendant asserts that there was unfair prejudice because the evidence admitted was not relevant to the issue at trial, which was whether the charged acts were consensual. He argues that the issue of credibility was central to the case, and by admitting evidence of the prior bad acts, the credibility of the complainants was enhanced, and thus, this evidence was more prejudicial than probative. These arguments are without merit.

MRE 401 defines "relevant evidence" as "'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Starr*, supra at 497 n 8, quoting MRE 401. Other acts evidence is logically relevant "to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin* (*After Remand*), 463 Mich 43; 614 NW2d 888 (2000).

In the case at bar, though there were some variations, defendant followed a common scheme. He approached each victim as she was walking, alone or with a friend, in Detroit. He asked for her phone number or invited her out to breakfast. Once the victims were in his car, defendant claimed to get a telephone call indicating that a shipment of stolen merchandise (cell phones, flat-screen televisions, lap tops, and Cartier glasses) would soon be arriving at his home.

Defendant would then take his victims to his residence, where he forced them to have sexual intercourse with him. He later dropped them off at a location of their choosing. Therefore, the other acts, as described by complainant and the other four women, and even defendant himself, were "sufficiently similar to support an inference that they [were] manifestations of a common plan [or] scheme." *Id*.

Moreover, in a sexual assault prosecution specifically, "evidence of prior acts is admissible under MRE 404(b) if it 'tend[s] to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent.'" *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996), quoting *People v Oliphan*t, 399 Mich 472, 488; 250 NW2d 443 (1976). In *Gibson*, "[t]he assault in each case involved a woman who [the] defendant knew was a crack cocaine user. In each case [the] defendant took affirmative steps to be alone with the complainant." *Gibson, supra* at 533. This Court ruled the evidence admissible under MRE 404(b) because it demonstrated "that [the] defendant had a plan for choosing his victim on the basis of knowledge that she was a crack user that would enable him to claim a sex-for-drugs swap should he be accused of the crime." *Id.* Similarly, in the case at bar, in addition to showing a common scheme or plan, the evidence of other acts was relevant in refuting defendant's claim that the sex was consensual and that the victims claimed rape only when he refused to give them the promised money or merchandise.

Finally, determining whether the probative value of the other acts evidence in the case at bar is substantially outweighed by unfair prejudice, "requires nothing more than the balancing process described in MRE 403." *Starr, supra* at 498. The determination is "best left to a contemporaneous assessment of the presentation, credibility and effect of testimony." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (quotation and citation omitted). For example, in *Starr* the Court noted that "the half-sister's testimony . . . makes more plausible the proposition that the mother's questions were prompted by concern for her daughter's safety rather than . . . a desire to prevent defendant from getting custody of the victim." *Starr, supra* at 503. The Court concluded that "the probative force of the evidence, coupled with the trial court's limiting instruction to the jury, did not stir the jurors to 'such passion . . . as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial.'" *Id*., quoting McCormick, Evidence (2d ed), § 190, p 454.

Here, the testimony from complainant and the other four women was probative on the issues of common scheme, lack of consent, and credibility. Moreover, the trial court gave a limiting instruction, explaining that while five cases had been consolidated, the jury "must consider each count separately in light of all of the evidence in the case" and could "find the defendant guilty of some counts, all counts, or no counts." Thus, the probative value of the evidence was not substantially outweighed by its potential for undue or unfair prejudice.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray